Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STACEY WEST

Respondent,

-against-

ROLAND WEST, JR.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: April 30, 1999

4588

QUESTIONS PRESENTED

1. Whether the Petition for Certiorari Should be Granted to Clarify Under What Circumstances a United States District Court May Summarily Enforce a Settlement Agreement When Disputes Exist With Respect to the Existence and/or Terms of the Agreement?

2. Whether the Petition for Certiorari Should be Granted Because the Decision of the United States Court of Appeals for the Ninth Circuit Concluding That the Arbitrator had Jurisdiction to Determine the Threshold Issue of Arbitrability is in Conflict With Decisions of This Court and the Other Courts of Appeals?

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OPINIONS BELOW

The opinion of the court of appeals, (App. *infra*, A2), is unreported. The opinion of the district court, (App. *infra*, A14), is also unreported.

JURISDICTION

The United States District Court for the Northern District of California exercised diversity jurisdiction in this case under 28 U.S.C. § 1332. The United States Court of Appeals for the Ninth Circuit had jurisdiction to hear the appeal from the District Court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals entered an order denying the Petition for Rehearing and Suggestion for Rehearing En Banc on February 3, 1999. (App. *infra*, A1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Roland West, Jr. ("Mr. West"), asks this Court to grant this Petition for Writ of Certiorari to consider significant issues involving enforcement of settlement agreements and confirmation of arbitration awards in federal court.

A. The Parties Outline the Terms of a Proposed Settlement, Including Provision to Submit Disputes Regarding the Settlement to an Arbitrator.

Respondent Stacey West ("Stacey") brought suit against Mr. West in the United States District Court for the Northern District of California. After participating in non-binding mediation in an attempt to settle the underlying tort claims, Mr. West and Stacey entered into an agreement setting out the essential terms of a settlement (the "Settlement Outline") that was to be the basis for a formal settlement agreement that would follow. The Settlement Outline included a provision that Stacey would assign certain claims to Mr. West. (the "Assignment-of-Claims Provision.") In addition, the Settlement Outline also provided that any disputes arising as a result of the agreement would be submitted to Allen Ruby, Esq. as binding arbitrator. (App., *infra*, A14-16.)

B. Stacey Asks the Arbitrator to Resolve a Dispute But Immediately Withdraws That Request and Insists That the Entire Case Proceed to Trial.

As the parties attempted to finalize the proposed settlement, they reached an impasse regarding the scope of the Assignment-of-Claims Provision. (App., *infra*, A15-17.) This dispute was brought to the attention of Alan Ruby, the designated arbitrator. ("Ruby"). Through her attorney, Stacey asked Ruby on March 12, 1997 to "take jurisdiction" over the parties dispute regarding the Assignment-of-Claims Provision and "decide it promptly." (App, *infra*, A11-13.)

Stacey almost immediately changed her mind about that request. Indeed, that same day, Stacey directed her attorney to send another letter to Ruby retracting the first letter. (App., *infra,* A10.) In this second March 12, 1997 letter, Stacey's attorney apologized for the first letter and stated that Stacey "no longer wishes to specifically enforce the [Settlement Outline] . . . instead, [Stacey] intends to proceed to trial in the underlying case." (App., *infra,* A10.) In a follow up letter sent eight days later, Stacey, through her attorney, made clear to Ruby her formal position refusing to submit disputes to him for arbitration. (App., *infra,* A8-9.) In this letter, Stacey specifically repudiated the arbitration clause and asserted that "the Arbitration Agreement is void or voidable and my client elects to treat it as such and proceed to a trial in Federal District Court." (App., *infra,* A8.) In addition, Stacey also stated that "even if the contract is not void, it is rescindable." (App., *infra,* A9.) This last letter concluded with a statement by Stacey's attorney that "my client does not elect to utilize your good offices, but instead [will] proceed to a jury trial." (App., *infra,* A9.)

C. The Arbitrator Nevertheless Proceeds to Consider the Dispute and Reaches a Decision.

Within a week of this last letter confirming that Stacey rescinded her consent to use of an arbitrator and wished to proceed to trial, an arbitration session was held. While Ruby acknowledged that Stacey challenged his authority to conduct the arbitration, he proceeded to enter an Order of Arbitration. In the order, Mr. West was required to pay the full amount set out in the Settlement Outline even though Mr. West had only agreed to the terms based on his understanding that Stacey also

would assign him her claims against Gayle West. (App., *infra*, A15-17.)

D. Stacey Now Decides the Arbitration was Proper and Moves for Enforcement of the Settlement and the Award.

Evidently pleased by the Order of Arbitration, Stacey moved to enforce the settlement agreement and the Order of Arbitration. (App., *infra*, A17.) Mr. West opposed the motion and asked the district court to conduct a hearing regarding enforcement of the settlement agreement because the existence of the agreement itself and/or material terms of the agreement were in dispute.

E. The District Court Ignores the Issues Related to the Settlement Agreement and Simply Confirms the Order of Arbitration.

The district court did not hold the requested hearing on enforcement of the settlement agreement. Instead, the district court, *sua sponte*, treated the motion to enforce the settlement agreement as a motion to confirm an arbitration award. Applying the more deferential standard to be used in confirming awards from arbitrators, the district court granted Stacey's motion in all respects without holding any hearing or examining the validity of the settlement agreement or the authority of the arbitrator to enter an order. (App., *infra*, A18-20.)

F. The Court of Appeals Affirms the District Court Decision.

Mr. West appealed to the United States Court of Appeals for the Ninth Circuit. In his appeal, Mr. West argued that the district court erred in failing to hold the requested evidentiary hearing on Stacey's motion to enforce the settlement agreement. Mr. West also asserted that because Stacey specifically repudiated the arbitration clause contained in the Settlement Outline, Ruby did not have the authority to decide the threshold issue of arbitrability, or, in the alternative, Stacey should be judicially estopped from benefitting from the inconsistent legal positions she took on submission of the disputes to arbitration. The Court of Appeals affirmed the district court's order in its entirety. (App., *infra*, A2-7.) Mr. West's motion for rehearing and suggestion for rehearing *en banc* was denied on February 3, 1999. (App., *infra*, A1.)

REASONS FOR GRANTING THE PETITION

The Petition for Certiorari should be granted because the decision of the United States Court of Appeals for the Ninth Circuit is inconsistent with established federal law and directly conflicts with decisions of this Court and the other courts of appeals on issues of exceptional importance. The Ninth Circuit's decision sanctions summary disposition by a district court of a motion to enforce a settlement agreement even where evidence conclusively demonstrates that a final settlement agreement was never reached and there was a substantial dispute as to both a material term of the proposed settlement and, at the time the motion was made, whether any agreement existed at all. This result is in conflict with clear precedent from this Court and creates a conflict with decisions of the other courts of appeals. The Petition should also be granted because

the Ninth Circuit's decision grants unprecedented authority to an arbitrator by confirming an award where the arbitrator himself decided whether he had authority to arbitrate issues without determining that there was clear and unmistakable evidence that the parties agreed to submit the issue to arbitration. The issues presented in this Petition are particularly noteworthy in light of strong public policies favoring settlement of cases and the growing use of arbitration as a method for resolving disputes.

POINT ONE **The Petition for Certiorari Should be Granted to Clarify Under What Circumstances a United States District Court May Summarily Enforce a Settlement Agreement When Disputes Exist With Respect to the Existence and/or Terms of the Agreement.**

The Petition should be granted to promote uniformity of decisions regarding the authority of a district court to summarily confirm a settlement agreement between parties. In this case, the Ninth Circuit concluded no evidentiary hearing was required on Stacey's motion to enforce a settlement agreement even though there were disputes between the parties regarding the very existence of any agreement and regarding the terms of whatever agreement existed. The record establishes that the disputes between the parties regarding the purported settlement agreement involve issues of material fact. The Ninth Circuit's decision conflicts with decisions by other courts of appeals that require a district court to conduct an evidentiary hearing under these circumstances.

A. The Ninth Circuit Concluded That No Evidentiary Hearing Was Required on Respondent's Motion to Enforce a Settlement Agreement Despite a Dispute Over The Existence And Terms of The Alleged Settlement Agreement.

In affirming the district court order, the Ninth Circuit determined that the district court could enforce a settlement agreement and confirm the arbitration award without any hearing. Although Stacey's motion was clearly styled as a motion to enforce a settlement agreement and the parties raised issues regarding the existence and terms of the supposed agreement, the Ninth Circuit effectively refused to consider the threshold questions regarding the existence and terms of the alleged settlement agreement. In its opinion, the Ninth Circuit stated that:

> the district court did not err in treating Stacey West's motion as a motion to confirm the arbitration award, rather than to enforce a settlement agreement, because the arbitrator was acting in his capacity as arbitrator when he conducted the telephonic conference and issued an order.

(App., *infra*, A4.) It is undisputed that there was a dispute about the terms of the alleged settlement agreement and a dispute about its very existence. Indeed, Stacey herself called into question the existence of any settlement when she rescinded the agreement, declared it void, and told Ruby he did not have her permission or the authority to arbitrate the disputes. (App., *infra*, A8-13.) The court nonetheless concluded that an

evidentiary hearing was not necessary, stating "the dispute over whether Stacey West's recission was effective does not involve contested issues of fact, but rather disagreement over the application of the law to the facts" and that decisions requiring the court to hold an evidentiary hearing could be distinguished because "the parties had clear intent and a signed written agreement." (App., *infra*, A7.)

The Ninth Circuit's decision adopts the district court's erroneous conclusions limiting, contrary to clear precedent, when a hearing is required on a motion to enforce a settlement agreement. According to this new interpretation, a party is apparently not entitled to a hearing where an outline of proposed settlement terms is reduced to writing. While the Ninth Circuit concludes that the parties' intent was clear, the record demonstrates there was a major factual dispute about the scope of the Assignment-of-Claims provision and the significance of Stacey's declaration that the settlement agreement was void and or rescinded.

B. The Disputes Regarding the Settlement Agreement Did Involve Issues of Fact.

Contrary to the Ninth Circuit's assertion, the parties' disputes regarding the purported settlement agreement did involve issues of material fact. The documentary evidence in the record establishes Stacey considered the settlement agreement to be void, voidable, or rescinded and in any event clearly elected to proceed with a trial on the merits. (App., *infra*, A8-13.)

As part of the Settlement Outline, Stacey was to assign claims she had against Jerry West and his associates arising out

of the management of any trust of which she was the beneficiary and he was the trustee. (App., *infra*, A14-15.) The parties contemplated that the informal agreement resulting from mediation, consisting only of short recitals with handwritten annotations, would be replaced by a more formal and complete agreement. (App., *infra*, A15.) In attempting to negotiate a final settlement, the parties reached an impasse regarding the nature of the assignment of claims Stacey was to make to Mr. West. Mr. West understood the assignment provision to include an assignment of any claim that Stacey had against her mother arising out of her role as trustee of one of Stacey's trust funds, while Stacey regarded the provision as including Jerry West and any of his associates, but not including her mother. (App., *infra*, A15.) This was clearly an issue of fact relating to a term of the purported settlement agreement.

There was also an issue of fact regarding whether there was even a valid, mutually binding, settlement that could be enforced. A material issue of fact existed regarding the effect of the March 12, 1997 and March 20, 1997 letters from Stacey's counsel declaring the proposed settlement agreement void, purporting to exercise her right of recission, and making an election to waive any right to arbitration she may have by proceeding to trial. (App., *infra*, A8-13.) Accordingly, there was a material issue of disputed fact regarding the validity of the proposed settlement agreement upon which Stacey sought enforcement, the very agreement that allegedly gave the arbitrator authority in the first place.

C. The Ninth Circuit Decision Conflicts With Decisions of Other Courts of Appeals Requiring an Evidentiary Hearing Under Similar Circumstances.

The Ninth Circuit's determination that no evidentiary hearing was necessary regarding the existence and terms of the so-called settlement agreement was inconsistent with numerous decisions from other courts of appeals. While it is well established that a district court has the power to summarily enforce a settlement agreement on motion, *see Autera v. Robinson*, 419 F.2d 1197, 1200 n.9 (D.C. Cir. 1969) (collecting cases), other courts of appeals have concluded that before an agreement may be enforced, where there are significant factual disputes, as in this case, a district court must hold an evidentiary hearing. The Petition should be granted to promote uniformity of decision among the courts of appeals and clarify the necessity for holding an evidentiary hearing on enforcement of a settlement agreement when issues regarding the existence of or terms of the agreement are raised.

If there is a dispute involving material facts concerning the terms or the existence of a settlement agreement, clear precedent from other courts of appeals requires a hearing on a motion to enforce a settlement agreement even where the parties sign a written agreement. For example, in the recent case of *Malave v. Carney Hosp.*, ___ F.3d ___, 1999 WL 112376 (1st Cir. 1999), the First Circuit vacated a district court's summary decision to enforce a purported settlement agreement. In reaching this decision, the court laid down a general rule that "a trial court may not summarily enforce a purported settlement agreement if there is a genuinely disputed question of material fact regarding the existence or terms of that agreement."

Malave, 1999 WL at *1. The court determined that, where there is such a dispute, a district court must hold an evidentiary hearing to resolve the contested issues. *Id.* In this case, the parties clearly had such a dispute about the terms and existence of the agreement, and under the First Circuit's general rule, a hearing should have been held. The Ninth Circuit's decision to the contrary is inconsistent with this general rule.

The Fourth Circuit has also weighed in against summary enforcement of agreements where disputes regarding terms exist. In *Ozyagcilar v. Davis*, 701 F.2d 306 (4th Cir. 1983), as in this case, the parties purportedly reached a settlement before trial and prepared an outline of their agreement. *Ozyagcilar*, 701 F.2d at 306. During the drafting of the formal settlement agreement, a dispute arose regarding the meaning of one of the clauses on the settlement outline, and the district court, without conducting an evidentiary hearing and "purporting to act as final arbiter," entered an order interpreting the provision. *Ozyagcilar*, 701 F.2d at 307-08. While noting that a district court retains inherent authority to enforce settlement agreements, the Fourth Circuit stated emphatically that this power did not extend to imposing "in the role of a final arbiter, a settlement agreement where there was never a meeting of the parties' minds." *Ozyagcilar*, 701 F.2d at 308. With the parties disputing the terms of the purported agreement, the Fourth Circuit instructed the district court to conduct a plenary hearing and determine whether there was even an agreement to interpret. *Ozyagcilar*, 701 F.2d at 308. The Ninth Circuit's refusal to order an evidentiary hearing is clearly incompatible with the Fourth Circuit's decision in *Ozyagcilar*. If the facts of this case had been analyzed consistent with the Fourth Circuit's decision in *Ozyagcilar*, the district court should have conducted an evidentiary hearing to determine whether there was an agreement.

In *Autera*, the District of Columbia Circuit dealt with a district court's summary enforcement of an oral settlement agreement. In reversing this decision, the court began by noting that such a summary procedure "is ill-suited to situations presenting complex factual issues related either to the formation or the consummation of the [settlement] contract, which only testimonial exploration in a more plenary proceeding is apt to satisfactorily resolve." *Autera*, 419 F.2d at 1200. Explaining that "a motion to enforce a settlement contract is neither ordinary or routine," *Autera*, 419 F.2d at 1203, the District of Columbia Circuit held that the parties were entitled to an evidentiary hearing regarding the issues of fact raised by the circumstances surrounding their oral settlement agreement. *Autera*, 419 F.2d at 1203. Having raised similar issues of fact regarding the existence and terms of the purported agreement in this case, under *Autera*, Mr. West would have been entitled to an evidentiary hearing, contrary to the Ninth Circuit's determination.

The Eleventh Circuit in *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483 (11th Cir. 1994), addressed a similar issue and, while affirming a district court's summary enforcement of a settlement, made it clear such a determination could not be made in all cases. In *Murchison*, appellant asserted that his lawyer did not have authority to enter into a settlement agreement. The Eleventh Circuit noted that an evidentiary hearing was necessary where material facts regarding the existence or terms of an agreement were disputed. *Murchison*, 13 F.3d at 1486. While finding that the agreement at issue was a complete agreement and appellant's attorney did have clear authority to enter into the settlement, the court noted that "summary enforcement of an alleged settlement is improper when there is a substantial factual dispute as to the terms of the settlement." *Murchison*, 13 F.3d at 1486. Under this standard,

Mr. West should have a received an evidentiary hearing because substantial factual disputes existed, contrary to the Ninth Circuit's determination.

In this case, the parties could not agree to final settlement agreement because they disputed the scope of the Assignment-of-Claims Provision, and the parties made it unclear whether the purported agreement was voided or rescinded by Stacey's election to proceed with a plenary trial. In refusing to order an evidentiary hearing, the Ninth Circuit's decision creates a clear conflict with the decisions of other courts of appeals. Mr. West was entitled to cross-examine witnesses and present evidence in opposition to the motion to enforce the settlement agreement. The Petition should be granted so this Court may correct this erroneous decision and promote uniformity of decisions among the various courts of appeals regarding how the courts will deal with requests to enforce settlement agreements.

POINT TWO **The Petition for Certiorari Should be Granted Because the Decision of the United States Court of Appeals for the Ninth Circuit Concluding That the Arbitrator had Jurisdiction to Determine the Threshold Issue of Arbitrability is in Conflict With Decisions of This Court and the Other Courts of Appeals.**

The Petition should also be granted because the Ninth Circuit erroneously concluded, inconsistent with this Court's precedents and decisions of other courts of appeals, that the arbitrator could determine key initial questions of arbitrability. Under the applicable precedents, the district court should have

considered whether the parties, by clear and unmistakable evidence, agreed to submit the issue of arbitrability to the arbitrator. In the absence of such a determination, the Ninth Circuit erred in affirming the district court's decision to defer to the arbitrator's decision.

A. The Ninth Circuit Affirmed the District Court's Determination That the Arbitrator Could Decide the Arbitrability Issue.

The Ninth Circuit affirmed the determination that the arbitrator had authority to adjudicate the arbitrability issue. The Settlement Outline provided that any disputes arising out of the agreement would be submitted to Ruby as binding arbitrator. (App., *infra,* A15.) The district court determined that "the parties specifically agreed that any disputes arising out of the Agreement would be submitted to binding arbitration," (App., *infra,* A18), although the district court cited no authority or explanation for this determination. The Ninth Circuit upheld this determination, stating that ample authority exists for the arbitrator to decide "issues of voidness and recission when the contract binds the parties to arbitration of all disputes arising from it." (App., *infra,* A4.) Neither the Ninth Circuit nor the district court commented on what effect Stacey's repudiation of the agreement, including its arbitration provisions, had on the arbitrability issue.

B. The Ninth Circuit Decision is Inconsistent With This Court's Precedent.

The Ninth Circuit's decision in this case is inconsistent with this Court's precedents regarding the arbitrability

determination. In the seminal decision of *Prima Paint Corp. v. Flood & Conklin Manufacturing*, 388 U.S. 395 (1967), this Court addressed the arbitrability issue, holding that under the Federal Arbitration Act, the issue of whether an entire contract containing an arbitration clause had been induced by fraud was to be decided by the arbitrator. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), this Court, in discussing the applicable standard of review to be applied to a district court's decision regarding an arbitration award, explained that a court must first determine whether the parties agreed to submit the arbitrability issue to the arbitrator. *First Options*, 514 U.S. at 943-44. A court must determine whether the parties agreed to submit the issue to arbitration first before it can pass on the validity of the arbitrator's ruling on the arbitrability issue. If the parties did agree to submit the arbitrability question to arbitration, a court will "give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *First Options*, 514 U.S. at 943. But where the parties did not agree to submit that issue to the arbitrator, a court must decide the issue independently. *Id.*

Consistent with this precedent, the district court should, as an initial matter, have considered whether there was a valid agreement to arbitrate following Stacy's withdrawal of the issue from Ruby and declaration that the agreement was void and/or rescinded, instead of simply deferring to the arbitrator's decision. As this Court has stated, "unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986). The Ninth Circuit failed to follow clear precedent from this Court when it affirmed the district court order despite the district court's

failure to determine that, based on clear and unmistakable evidence, the parties did agree to have the arbitrator determine the arbitrability issue.

C. The Ninth Circuit Decision is Inconsistent With Decisions of Other Courts of Appeals.

The Ninth Circuit's decision is inconsistent with decisions by other courts of appeals regarding the arbitrability issue. By ignoring the effects of Stacey's recission and simply deferring to the arbitrator's decision, the Ninth Circuit has created a conflict with decisions in other circuits establishing the need for a specific judicial determination of the arbitrability issue where the parties' agreement to submit the issue to arbitration is not completely and unmistakably clear.

For example, in *General Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242 (1st Cir. 1998), the First Circuit emphasized the importance of a judicial determination regarding arbitrability in the absence of a clear agreement. In addressing whether the arbitrator had authority to arbitrate a particular dispute, the First Circuit identified the parties' agreement and intent as the starting point in any such analysis, stating that "the question of whether an arbitrator has the power to arbitrate a dispute depends on whether the parties to the dispute agreed to submit the question to that arbitrator for decision." *Pamela*, 146 F.3d at 248. In making its ultimate determination that the evidence was insufficient to establish that the parties agreed to arbitrate a particular issue, *Pamela*, 146 F.3d at 250, the First Circuit emphasized that courts should not assume that the parties agreed to arbitrate any particular issue, and should reach such a conclusion only when there is "clear and unmistakable evidence" that they agreed to do so. *Pamela*, 146 F.3d at 248.

In contrast, the Ninth Circuit appears to have assumed that the arbitrator had the authority to determine the arbitrability issue, without examining the entire record to see whether the alleged agreement to arbitrate was supported by the "clear and unmistakable evidence" standard utilized by the First Circuit.

The Eleventh Circuit's decision in *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007 (11th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 798 (1999), also stands in stark contrast to the Ninth Circuit's decision in this case. In *Scott*, the court addressed the specific issue of whether the parties had agreed to have the arbitrator determine whether the dispute was arbitrable. As in this case, the arbitrators in *Scott* entered an award and implicitly decided they had the power to decide the arbitrability issue. The court first noted that arbitration was "a creature of contract" and that no party could be forced to submit a dispute to arbitration unless that party gave "prior contractual consent to do so." *Scott*, 141 F.3d at 1011. The Eleventh Circuit refused to give deference to the arbitrator's decision, stating that such deference was only appropriate "if we agree that the parties clearly and unmistakably consented to have [the arbitrator] decide issues of arbitrability." *Scott*, 141 F.3d at 1011, *citing First Options*, 514 U.S. at 943. In contrast, the Ninth Circuit did accord the arbitrator's decision complete deference without determining, as the Eleventh Circuit requires, that the parties to the dispute "clearly and unmistakably" consented to having the arbitrator decide the arbitrability issue.

D. The Record Shows the Parties Did Not Clearly and Unmistakably Agree to Arbitrate the Arbitrability Issue.

The record also would not support a conclusion that the parties in this case clearly and unmistakably agreed to submit the

arbitrability issue to arbitration. In fact, there is clear evidence that Stacey herself repudiated the agreement and believed it did not bind her to arbitrate. In concluding that Ruby was authorized to make all determinations, including the threshold issue of arbitrability, the Ninth Circuit refused to consider the fact that Stacey specifically repudiated the arbitration provision and elected to proceed with a trial on the merits. Where a party expressly repudiates the arbitration provision itself, or it can be reasonably inferred that a party wanted to present its case in court instead of in an arbitration, that party will be held to have waived its right to proceed to arbitration. *California Trucking Ass'n v. Brotherhood of Teamsters & Auto Truck Drivers*, 679 F.2d 1275, 1284 (9th Cir. 1980), *cert. denied*, 459 U.S. 970 (1982). Here, the record indicates that Stacey repudiated the arbitration provision and specifically elected not to settle the case but to proceed to a trial on the merits. (App., *infra*, A8-13.)

The Ninth Circuit's decision in this case, according deference to the arbitrator's arbitrability determination without clear and unmistakable evidence of an agreement, is clearly in conflict with decisions in other circuits. *See also Smith Barney, Inc. v. Sarver*, 108 F.3d 92, 95-97 (6th Cir. 1997) (need clear and unmistakable evidence of agreement to arbitrate arbitrability issue to allow "the arbitrators to define the scope of their own power and authority"). The Petition should be granted to correct this erroneous decision and promote uniformity in decisions regarding the arbitrability determination.

CONCLUSION

For the foregoing reasons, Roland West, Jr. respectfully requests that this Court grant the Petition for Writ of Certiorari and grant him such other and further relief to which he may be justly entitled.

Dated: April 30, 1999

Respectfully Submitted,

By: _____

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

		Filed Feb 9 1999
STACEY WEST,	)	NO. 97-16789
Plaintiff-Appellee,	)	D.C. No. CV-95-20422-RMW
	)	
-v-	)	ORDER
	)	
ROLAND WEST, JR.,	)	
Defendant-Appellant	)	
	)	

Before: D.W. NELSON, RYMER, and T.G. NELSON , Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Rymer and T.G. Nelson voted to reject the suggestion for rehearing en banc, and Judge D.W. Nelson recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed r. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

		Filed DEC 22 1998
STACEY WEST,	)	NO. 97-16789
Plaintiff-Appellee,	)	D.C. No. CV-95-20422-RMW
	)	
-v-	)	MEMORANDUM*
	)	
ROLAND WEST, JR.,	)	
Defendant-Appellant	)	
	)	

Appeal from the United States District Court
for the Northern District of California
Ronald W. Whyte, District Judge, Presiding

Submitted December 7, 1998**
San Francisco, California

Before: D.W. NELSON, RYMER, AND T.G. NELSON, Circuit Judges.

Ronald E. West, Jr. appeals the district court's order granting his adopted daughter Stacey West's motion to confirm an arbitration agreement. He appeals on five grounds: (1) the district court erred in

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. Rule 34-4.

treating Stacey West's motion as a motion to confirm an arbitration award, rather than to enforce a settlement agreement; (2) The district court erred in finding the parties bound by arbitration because no settlement agreement existed; (3) The district court erred in holding that Stacey West is not estopped from enforcing the arbitration award; (4) The district court erred in finding that Stacey West's breach of the confidentiality provision did not void the settlement agreement; (5) The district court abused its discretion by not holding an evidentiary hearing. The parties are familiar with the facts, and we discuss them only as necessary to explain our reasoning.

We affirm the district court. Because the case involves the enforcement of an arbitration award, we review the district court's findings of fact for clear error and decisions of law de novo. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947-48 (1995); Int'l Bhd. of Teamsters v. Silver State Disposal Serv., 109 F. 3d 1409, 1410-11 (9th Cir. 1997). The district court must uphold findings of the arbitrator so long as they are plausible. See Tristar Pictures, Inc. v. Director's Guild of Am., Inc., No. 96-55991, 1998 WL 765100, at *4 (9th Cir. Nov. 4, 1998). We review the district court's failure to

conduct an evidentiary hearing for abuse of discretion. See Callie v. Near, 829 F. 2d 888, 890 (9th Cir. 1987).

First, the district court did not err in treating Stacey West's motion as a motion to confirm the arbitration award, rather than to enforce a settlement agreement, because the arbitrator was acting in his capacity as arbitrator when he conducted the telephonic conference and issued an order. Stacey West's motion followed this order and was intended not only to enforce the agreement as she saw it, but to enforce the binding arbitration award. Although Roland West's reply suggests that he lacked proper notice, we decline to consider the point because it was not raised in his opening brief.

Second, the district court did not err in holding that the parties were bound by the arbitration award. Both the Supreme Court and this Court have held that arbitrators decide issues of voidness and rescission when the contract binds the parties to arbitration of all disputes arising from it. See Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-04 (1967); Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc., 925 F. 2d 1136, 1140-41 (9th Cir. 1991); Teledyne, Inc. v. Kone Corp., 892 F. 2d 1404, 1410-11 (9th Cir. 1990). In any event,

Stacey West's claim that she had validly rescinded the settlement agreement was not an independent challenge to the arbitration provision of the agreement and did not deprive the arbitrator of jurisdiction to determine the issue of rescission. The arbitrator thus had jurisdiction to decide whether Stacey West's rescission was effective.

Roland West claims that the arbitrator wrongly concluded that the agreement had not been rescinded under California Civil Code §§ 1689 (b)(2) and 1691. The arbitrator's assessment of the facts and application of the law to them is plausible, however. See Tristar Pictures, Inc., No. 96-55991, 1998 WL 765100, at *4. Roland West's initial failure to pay did not constitute total failure of consideration; he never suggested that he would not satisfy the agreement once its terms were clarified. See Cal. Civ. Code §1689 (b)(2), (b)(4). The arbitrator's statement that the parties have a good faith dispute, rather than that Roland West repudiated the agreement, is a conceivable interpretation of the facts. The district court therefore did not err in holding that the parties were bound by the arbitrator's decision that the contract was not void or rescinded.

Third, the district court did not clearly err in failing to estop

Stacey West from obtaining the benefits of the arbitral award. Roland West's reliance on Jacobs v. Universal Development Corp., 53 Cal. App. 4th 692 (1997), is misplaced, as Jacobs indicates that the "in pari delicto" doctrine should be invoked sparingly and only when "moral turpitude" is involved. Id. at 703. Regardless of the ethics of Stacey West's conduct, the district court did not err in failing to find it "reprehensible."

Likewise, Estate of Anderson, 60 Cal. App. 4th 436 (1997), does not support applying the doctrine of "quasi-estoppel" in this case. The deceased in Anderson relied on her first spouse's disavowal of their marriage and subsequently remarried, see id. at 439-43; here, by contrast, the district court found that Roland West did not rely on Stacey West's claim that the settlement agreement was void. Roland West does not challenge this finding, nor could he. Because, unlike in Anderson, the equities here do not favor invocation of the doctrine, the district court did not clearly err in failing to estop Stacey West from enjoying the benefits of the arbitration award.

Fourth, the district court did not err in holding that Stacey West's alleged breach of the confidentiality provision failed to void the

settlement agreement. See Kaplan, 514 U.S. at 947-48. Although the district court concluded that Stacey West should have filed the motion to confirm the arbitration award and supporting documents under seal, it declined to hold that failing to do so rendered the agreement null and void. Rather, the district court properly characterized the problem as an "alleged breach" of the agreement, which, in turn, neither the district court nor we can reach since breaches of the agreement, if any, are for the arbitrator, not the court, to determine.

Fifth, the district court did not abuse its discretion in denying an evidentiary hearing. The dispute over whether Stacey West's rescission was effective does not involve contested issues of fact, but rather disagreement over the application of the law to the facts. Additionally, the district court's distinguishing of Callie is reasonable. In Callie, this Circuit held that an evidentiary hearing is required when "material facts concerning the existence or terms of an agreement to settle are in dispute . . ." Callie, 829 F. 2d at 890. The district court explained that in the instant case, unlike in Callie, the parties had clear intent and a signed written agreement.

AFFIRMED.

LAW OFFICES OF
G. DANA
SCRUGGS

340 Soguel Avenue◆Suite 205◆Santa Cruz, California 95062◆(408) 457-3700◆FAX (408) 458-1165◆E-Mail Scruggsgd@aol.com

March 20, 1997

VIA FACSIMILE AND MAIL
Allen J. Ruby, Esq.
RUBY & SCHOFIELD
60 So. Market Street, Ste.1500
San Jose, Ca 95113

Re: Stacey West v. Roland E. West, Jr.
United States District Court
Case No. C-95 20422 RMW PVT (ARB)
Your File No. AR-001-713

Dear Mr. Ruby:

You requested written comments regarding Mr. West's letter to you by today at noon. As my letter to you of March 12, 197, indicates, my client regards the Settlement Agreement as void as a result of Mr. West's failure to pay the agreed settlement amount. As a result, the Arbitration Agreement is void or voidable, and my client elects to treat it as such and proceed to trial in Federal District Court.

Where there is a total failure of consideration, as evidenced by Mr. West's failure to honor the Agreement and pay the sum due and, instead, emotionally blackmail my client in the manner set forth in his ridiculous letter of February 6, 1997, to you, the purported contract is regarded as void and may be disregarded without taking procedural steps of recision. 1 Witkin, Summary 9th, "Contracts §879; and Holt v. Ravini (1963) 221 Cal. App. 2d 213, 216 ("A defendant cannot in equity and good conscience retain the benefits of the agreement and repudiate its burdens"). Witkin points out that, where one party has materially failed to perform his promise, or there has been a material

delay in his performance, the other party's duty to perform is discharged. Witkin, supra. at §757.

Second, even if the contract is not void, it is rescindable due to Mr. West's material failure to perform. A written arbitration agreement is enforceable under California law "save upon such grounds as exist for the revocation of any contract." CCP §1281. The term "revocation" refers to the grounds for recision of any contract. Witkin, California Procedure 4th, "Proceedings Without Trial," §499.

California Civil Code §1689(b) states the grounds for a recision which include: (2) if the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds; and (4) if the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause.

In short, Mr. West's complete failure to perform the written Agreement, which included the Arbitration Clause, entered into in your office renders the Agreement void or voidable; and, because of this failure of consideration and the circumstances of Mr. West's ongoing loathsome and despicable conduct, my client does not elect to utilize your good offices, but instead proceed to jury trial.

Thank you for your efforts. I will be in my office tomorrow at 1:00 p.m., and, as always, would be happy to speak with you and Mr. Manchester.

Best Regards,

G. Dana Scruggs, III

GDS:md
cc: Steven R. Manchester, Esq. (via fax and mail)

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March 12, 1997

VIA FACSIMILE AND MAIL
Allen J. Ruby, Esq.
RUBY & SCHOFIELD
60 So. Market Street, Ste, 1500
San Jose, CA 95113

Re: Stacey West v. Roland E. West, Jr.
United States District Court
Case No. C-95 20422 RMW PVT (ARB)

Dear Mr. Ruby:

By letter dated March 12, 1997, I wrote to you on behalf of my client, Stacey West, to request that you specifically enforce the Settlement Agreement reached between my client and Mr. West in the mediation of March 17, 1997.

I am writing to apologize for that request, and to inform you that my client no longer wishes to specifically enforce the Agreement which has been materially breached by Mr. West's failure to timely pay the settlement amount. Instead, my client intends to proceed to trial in the underlying case, and she will be requesting a new trial date from Judge Whyte.

Sincerely,

G. DANA SCRUGGS, III

GDS:md
cc: Steven R. Manchester, Esq.

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March 12, 1997

Allen J. Ruby, Esq.
RUBY & SCHOFIELD
60 So. Market Street, Ste. 1500
San Jose, CA 95113

Re: Stacey West v. Roland E. West, Jr.
United States District Court
Case No. C-95 20422 RMW PVT (ARB)

Dear Mr. Ruby:

I have been informed by Steve Manchester, attorney for Roland "Buzz" West, Jr., that his client is unwilling to perform on the Settlement Agreement executed by all parties at the mediation which you successfully concluded on January 17, 1997. Specifically, I have been informed that Mr. West refuses to deliver the past due settlement amount unless the "formal" Settlement Agreement includes an assignment to Mr. West of any claims my client, Stacey West, may have against her own mother Gayle West arising out of the management of the 1973 Trust of which Gerald West was Trustee.

Mr. Manchester has indicated that he and his client would like to submit this issue to you as a binding arbitrator; Mr. Manchester has indicated that Mr. West will be writing to you to state his position.

I am writing to you at this time to request that you take jurisdiction of this issue, and decide it promptly. Enclosed for your reference is the written and binding Settlement Agreement signed by all parties and their attorneys, dated January 17, 1997, which was entered

into in your office. You will note that it plainly provides that Plaintiff will assign all claims she may have against "Jerry West and his associates arising out of the management of any trust of which she was the beneficiary. . . ." The Settlement Agreement clearly does not anticipate, nor would Stacey ever agree, to assign any possible claim she might have against her own mother, Gayle West, to Roland West. Certainly, Gayle West has never been an "associate" of Jerry West.

Furthermore, in mid-February, Mr. Manchester mailed me a draft of a more formal Release and Settlement Agreement and an Assignment of Claims and Power of Attorney. A discussion was had

regarding modifications my client requested to the proposed Release and Assignment. On February 24, 1997, I wrote to Mr. Manchester requesting that the Release and Assignment be modified so as to make clear that Stacey was not assigning any cause of action she might have against her mother to Mr. West; the letter also made clear that my client was insisting upon receiving interest at the legal rate of 10% simple on the $640,000 which was to be paid on or before February 20, an amount totaling $175.34 per day.

On February 25, 1997, Mr. Manchester responded by Federal Expressing the revised Release and Assignment, making the modifications discussed, apparently with the approval of Mr. West. I enclose both that letter, and the Release and Settlement Agreement, and Assignment Claims, both of which were executed by Stacey on February 26.

On February 28, I learned for the first time that Mr. West was apparently suffering from buyer's remorse due to his desire to obtain an assignment of Stacey's potential causes of action against her own mother. On February 28, 1997, I wrote to Mr. Manchester outlining my client's position regarding Mr. West's recalcitrance, which is

enclosed.

I would request that, after receiving Mr. West's position paper on this matter, you quickly and judiciously rule as follows: that the binding written Settlement Agreement entered into between the parties does not include any assignment of any of Stacey's claims against her mother, Gayle West, as set forth in the original Agreement signed in you office and in the more formal Release and Assignment prepared by Mr. Manchester and executed by my client; and that my client has performed the Settlement Agreement in good faith to date, and she is entitled to be paid the $640,000 plus interest at $175.34 per day from February 20, 1997, until paid in full.

Sincerely,

G. DANA SCRUGGS, III

GDS:md
Enclosures
CC: Steven R. Manchester, Esq.

FILED
AUG 12 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STACEY WEST, Plaintiff, -v- ROLAND E. WEST, JR., Defendant.	NO. C 95-20422RMW(PVT) ORDER GRANTING PLAINTIFF'S MOTION TO CONFIRM ARBITRATION AWARD

Plaintiff's motion to enforce settlement agreement was heard on August 8, 1997.[1] The court has read the moving and responding papers and heard the oral argument of counsel. For the reasons set forth below, the court grants plaintiff's motion.

I. BACKGROUND

The parties in this action reached a settlement agreement ("Agreement") on January 17, 1997. The Agreement provided that defendant would pay plaintiff a certain sum on or before February 20, 1997 and that plaintiff would dismiss her claims against defendant as

[1]Plaintiff titled her motion as a motion to enforce the settlement agreement. The court is treating the motion as one to confirm the arbitration award.

well as assign any claims she had against Jerry West (defendant's cousin) and his associates arising from West's alleged mismanagement, as trustee, of a trust set up for plaintiff by her grandmother. The Agreement also provided that any disputes arising as a result of the Agreement would be submitted to Allen Ruby, Esq. as binding arbitrator.

Following the mediation on January 17, 1997 which resulted in the Agreement, defendant's counsel prepared the final versions of the Agreement and Assignment of Claims document. Plaintiff executed both documents. On February 28, 1997, however, defendant's counsel notified plaintiff's counsel that defendant would neither execute the Agreement nor pay the funds due unless the Assignment of Claims included an assignment of any claims plaintiff had against Gayle West, her mother.[2]

Because this dispute had arisen over the terms of the

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[2]Defendant apparently made this claim despite the fact that the Assignment of Claims document which was drafted by defendant's counsel specifically excluded claims plaintiff may have against Gayle West. Declaration of G. Dana Scruggs in Support of Motion, Ex. C (letter from defendant's counsel noting that document excludes such claims).

settlement, defendant suggested that the dispute be submitted to Mr. Ruby for binding arbitration pursuant to the terms of the Agreement. Declaration of G. Dana Scruggs in Support of Motion ("Scruggs Decl."), ¶6. Plaintiff agreed and submitted a letter to Mr. Ruby outlining the issues on March 12, 1997. Scruggs Decl. Ex. F. Later that same day, plaintiff decided that is was her belief that defendant had breached the Agreement by failing to pay the amounts due and that she no longer wished to enforce the Agreement but wished to proceed to trial. Scruggs Decl. Ex. H, p. 32[3](letter from plaintiff's counsel to Mr. Ruby stating her belief that the Agreement had been breached); Ex. H. p. 33. Nevertheless, the parties participated in an arbitration session with Mr. Ruby on March 24, 1997 in which both sides argued their positions. On March 27, 1997, Mr. Ruby issued his decision. Scruggs Decl. Ex. H.

Despite plaintiffs arguments, Mr. Ruby determined that the Agreement was not void for failure of consideration and that defendant

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[3]Because Exhibit H to the Scruggs Declaration contains the decision of the arbitrator as well as attachments to that decision which are not separately identified, page number references are to the facsimile page number references in the top right corner of each page of Exhibit H.

had not repudiated the Agreement. Scruggs Decl. Ex. H, p. 5. Mr. Ruby further determined that the exclusion of claims against Gayle West from the Assignment of Claims fairly reflected the intent of the parties when the executed the informal settlement agreement on January 17, 1997.[4] Scruggs Decl. Ex. A. Mr. Ruby concluded that the phrase "and his associates" did not apply to Gayle West. Scruggs Decl. Ex. H, pp. 5-6. Defendant was ordered to immediately execute the Agreement and deliver it together with the amount due to his attorney.

Defendant has not performed pursuant to the arbitrator's order and consequently plaintiff was forced to file this motion to enforce the settlement agreement. Plaintiff also requests attorney's fees for being forced to bring this motion.

Defendant contends that the Agreement is null and void based upon plaintiff's March 12, 1997 letter to Mr. Ruby indicating that it was her belief that defendant had breached the Agreement, that she no longer wished to enforce the Agreement and wanted to proceed to trial. Defendant further contends that plaintiff is estopped from trying to

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[4]The arbitrator also determined that defendant was not entitled to deduct certain amounts he claimed to be entitled to deduct from the amount owed under the Agreement. Scruggs. Decl. Ex. H. pp. 5-6.

enforce the Agreement now. Finally, defendant contends that plaintiff breached the Agreement by filing this motion thereby disclosing the terms of the Confidential Agreement.[5]

II. ANALYSIS

Here, the parties specifically agreed that any disputes arising out of the Agreement would be submitted to binding arbitration. The parties are therefore bound by the findings of the arbitrator. See Artco Corp. v. Lynnhaven Dry Storage Marina, Inc., 898 F. 2d 953, 957 (4th Cir. 1990). Further, it is defendant who specifically requested that the dispute be submitted to Mr. Ruby. Both parties submitted letter briefs on the issues and participated in the arbitration. Scruggs Decl. Exs. F-H. At no time did defendant question the authority of the arbitrator or

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[5]Defendant also contends that he is entitled to an evidentiary hearing if the court does not accept defendant's statement of the facts as set forth in his opposition. Defendant's Opposition, p. 2. The court finds that defendant is not entitled to an evidentiary hearing. The record before the court is clear and complete. Further, defendant's reliance on Callie v. Near, 829 F. 2d 888 (9th Cir. 1987), is misplaced. In Callie the parties disputed their intent to be bound until execution of a final written agreement. The court held that the district court erred in not holding an evidentiary hearing regarding the intent of the parties as there was no signed agreement when the plaintiff moved for entry of judgment. Callie, 829 F. 2d 891. Here, by contrast, the parties' intent was clear and the parties signed a written agreement on January 17, 1997. Scruggs Decl. Ex. A. The parties also agreed, on January 17, 1997, that any disputes arising out of that written agreement would be sent to binding arbitration.

object to the binding arbitration. He cannot do so now. While plaintiff did object to Mr. Ruby's authority in light of plaintiff's belief that defendant had breached and that she therefore had a right to rescind, plaintiff's objection is irrelevant to defendant's position. Further, plaintiff was wrong. See Ericksen, et al. v. 100 Oak Street, 35 Cal. 3d 312 (1983).

The court also finds defendant's estoppel argument unpersuasive. Defendant did not rely on plaintiff's position that she believed she had a right to rescind the contract as shown by his participation in the arbitration that he had requested take place. Finally, the court does not find the Agreement null and void because of plaintiff's alleged breach of confidentiality provision for filing this motion. Plaintiff, however, should have filed the motion and supporting documents under seal. The court orders that the settlement agreement be sealed. See Order Sealing Scruggs Decl. Exs. A, D, G and H. Further, plaintiff's motion to confirm the arbitrator's award is granted without prejudice to defendant's seeking relief for any damages he suffered as a result of any breach of the confidentiality provision of the Agreement.

Thus, the court finds that the Agreement entered into between the parties is enforceable. Thus, defendant is ordered to comply with the arbitration order enforcing the terms of the Agreement. The court determines that attorney's fees are not appropriate and therefore denies plaintiff's request for attorney's fees. The court further finds that interest at the rate of 10% is due from the date of the arbitration award, March 27, 1997.

III. ORDER

Based on the foregoing, the court hereby grants plaintiff's motion to confirm the arbitration award and the parties are ordered to carry out the terms of the settlement agreement.

DATED: 8/12/97

RONALD W. WHYTE
United States District Judge